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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-648

JOHN FARLEY OWEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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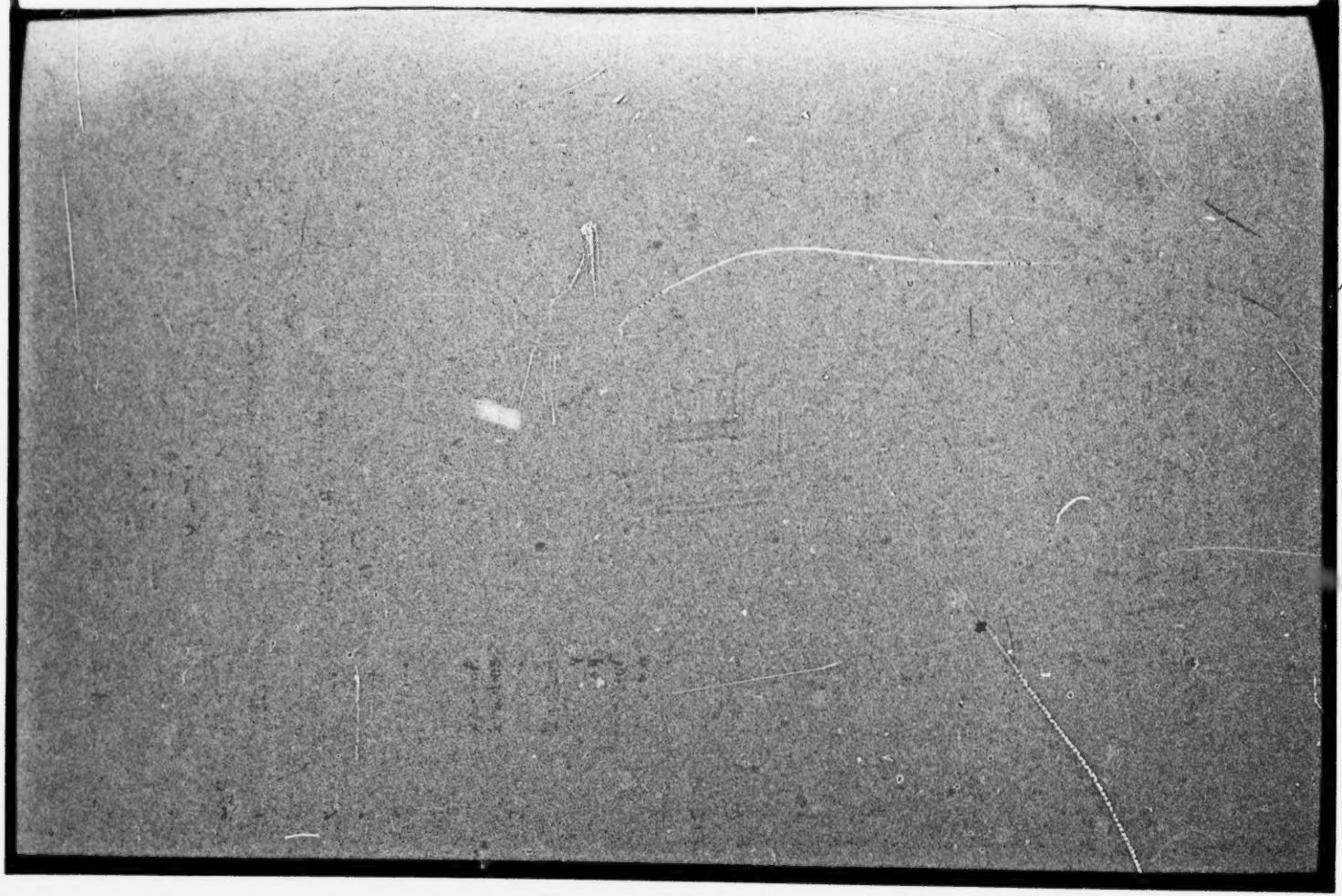

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JOHN FARLEY OWEN,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, John Farley Owen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals affirming his conviction in the United States District Court for the Southern District of Texas, Laredo Division.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reprinted in Appendix A hereto, infra page 11, and is reported as *United States v. Owen,* 493 F.2d 463 (C.A. 5, 1974).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction on April 29, 1974. Petitioner timely filed Motion for Rehearing and Motion for Rehearing En Banc. The Court of Appeals denied both motions on November 1, 1974 and Petitioner gave notice of his intent to file Petition for Writ of Certiorari and filed Motion to Stay Mandate. Petitioner's Motion to Stay Mandate was granted by the Court of Appeals on November 7, 1974, pursuant to Rule 41, F.R.A.P., to and including December 1, 1974, or unitil notified by the clerk of the United States Supreme Court that this Petition for Writ of Certiorari has been filed. Jurisdiction of the Supreme Court is invoked under the authority of 28 U.S.C. 1254(1), and Rule 19, Sec. 1(b), Supreme Court Rules.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE, MADE IN THE ABSENCE OF PROBABLE CAUSE, "FOUNDED SUSPICION" OR CONSENT, BY UNITED STATES BORDER PATROLMEN ON "ROVING PATROL" ON A HIGHWAY MORE THAN FIFTY MILES FROM THE UNITED STATES-MEXICAN BORDER, VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.

II. WHETHER THE *RATIO DECIDENDI* OF *U. S. v. ALMEIDA-SANCHEZ*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.ED. 2d 596 (June 21, 1973) SHOULD BE APPLIED TO SIMILAR CASES PENDING OR ON APPEAL ON THE DATE OF SAID DECISION, i.e. TO SIMILAR SEARCHES WHICH OCCURRED

BEFORE JUNE 21, 1973, AND THUS TO THE SEARCH IN THIS CASE, WHICH TOOK PLACE DECEMBER 11, 1972. ON THIS QUESTION THE COURTS OF APPEAL FOR THE FIFTH, NINTH AND TENTH CIRCUITS ARE IN CONFLICT.

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Following a jury trial, Petitioner was found guilty of conspiring to import marijuana, importing marijuana and possessing marijuana with intent to distribute it.[1] On the 15th of June, 1973 he was sentenced to forty months confinement, five years probation following his release, a special parole term of two years, and a fine of One Thousand Dollars ($1,000.00).

Petitioner's indictment was based upon his warrantless arrest at ten o'clock at night on December 11, 1972 in Hebronville, Texas. Petitioner's automobile was stopped by two United States Border Patrol agents on "roving patrol" fifty miles north of the Texas-Mexican border on Texas Highway 16. Although this highway runs between

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1. Violations of various sections of Title 21, United States Code.

the "border town"[2] of Zapata, Texas and Hebronville, there are several towns and villages between Hebronville and Zapata as well as several farm roads, ranch roads and highways intersecting with Highway 16 between Zapata and Hebronville. There are numerous farms and ranches with private roads leading into Highway 16.

The agents first observed Petitioner's car approximately one-half mile south of Hebronville and followed it into Hebronville. During this period of observation the agents saw nothing suspicious about the car or its occupants,[3] except that the car had "out-of-county" license plates, i.e. from some other Texas County. This was not unusual since December 11th is during the middle of the hunting season in South Texas and many of the farms and ranches in the area lease hunting rights to out-of-county hunters. Nonetheless, the agents stopped the car.

The agents satisfied themselves that both of the occupants of the car were United States citizens. By furnishing the license number of the car to the National Crime Information Center via radio, the officers determined that the car was not stolen or wanted. The agents had no other pre-arrest information on Petitioner, his passenger or the car. That is to say, there was no suggestion that the car or its occupants had ever crossed the Texas-Mexican border, nor was there any demonstrable nexus to the border. Fur-

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2. Although Zapata is called a "border town", there is no bridge across the Rio Grande nor any other way for vehicles to enter or leave Mexico there. The closest crossing point for cars is Laredo, forty-five miles north of Zapata on U.S. Highway 83, or Roma, forty miles south of Zapata on U.S. Highway 83.

3. Petitioner was driving. The passenger, Harry David Short, was also charged in the indictment but entered a plea of guilty prior to Petitioner's trial.

ther, there were no facts known to the agents which would give rise to a reasonable suspicion or "founded suspicion" that the car or its occupants were in the country illegally or that the car contained contraband. The ensuing search of the trunk of Petitioner's automobile revealed the marijuana made the basis of his indictment and conviction.

ARGUMENT

I.

THE STOP AND SEARCH OF PETITIONER AND HIS AUTOMOBILE VIOLATED LONG ESTABLISHED FOURTH AMENDMENT STANDARDS.

This case involves a "roving patrol" automobile search more than fifty miles from the Mexican Border on a road that does not cross the border. Nothing about the time of arrest, location of the arrest, appearance of the car, appearance of the Petitioner or observations of the officers gave rise to any reasonable suspicion of illegal activity such as would authorize a search of Petitioner or his automobile for contraband or illegal aliens. The location of the search was not the "functional equivalent of the border" nor was there a demonstrable nexus with the border. Thus, even by what the Fifth Circuit now calls "pre-*Almeida-Sanchez* standards", the search here was illegal. As recently as August 9, 1974 the Court of Appeals for the Fifth Circuit, in *United States v. Diemler*, 498 F.2d 1070 (C.A. 5, 1974) held that "pre-*Almeida-Sanchez* law" required the Government to meet a two-pronged burden of proof to sustain a "border search". The Government's evidence must show:

(1) Articulable facts which give rise to a *"reasonable suspicion"*[1] *of a customs or immigration violation: U. S. v. Speed,* 497 F.2d 546 (C.A. 5, July 18, 1974); *U. S. v. Daley,* 493 F.2d 395 (C.A. 5, 1974); *U. S. v. Storm,* 480 F.2d 701 (C.A. 5, 1973); *U. S. v. McDaniel,*[2] 463 F.2d 129 (C.A. 5, 1972); Cert. Den. 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973); *Morales v. United States,* 378 F.2d 187 (C.A. 5, 1967); *Thomas v.* United States, 372 F.2d 252 (C.A. 5, 1967); *Morris v. United States,* 344 F.2d 317 (C.A. 5, 1965); and

(2) Nexus with the border: *U. S. v. Speed,* supra; *U. S. v. Byrd,* 494 F.2d 1284 (C.A. 5, 1974); *U. S. v. Bursey,* 491 F.2d 531 (C.A. 5, 1974); *U. S. v. McKim,* 487 F.2d 305 (C.A. 5, 1973); *U. S. v. Steinkoenig,* 487 F.2d 225 (C.A. 5, 1973); *U. S. v. Storm,* supra; *Morris v. United States,* supra.

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1. A more fortunate choice of phrases would have been "founded suspicion", the term used in the Ninth Circuit.

2. As Circuit Judge Goldberg succinctly said: "[P]roximity to the frontier does not automatically place a 100 mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements." *U. S. v. McDaniel,* 463 F.2d at p. 133.

In the instant case the Government is unable to satisfy either prong of the test.

Since his arraignment and the filing of his Motion to Suppress Evidence, Petitioner has challenged the constitutionality of his arrest and the search of his automobile, basing his attack on *Carroll v. U. S.,* 267 U.S. 132, 45 St.Ct. 280, 69 L.Ed. 543 (1925) and existing Fifth Circuit

law.[3] He has maintained this position throughout his trial and appeal.

Simply stated, his position is that the agents had no cause to stop him and search him. Thus the Fifth Circuit's current stance, i.e. "Pre-*Almeida-Sanchez*" law required "reasonable suspicion" of a violation, "Post-*Almeida-Sanchez*" law requires probable cause; is not determinative of the issue. Under either standard the search of Petitioner fails.

II.

ALMEIDA-SANCHEZ AFFIRMED LONG STANDING CONSTITUTIONAL PRINCIPLES AND SHOULD BE APPLIED RETROACTIVELY.[4] THERE IS A CONFLICT BETWEEN THE COURTS OF APPEAL FOR THE FIFTH, NINTH AND TENTH CIRCUITS ON THIS QUESTION, WHICH CONFLICT THE SUPREME COURT SHOULD RESOLVE IN FAVOR OF RETROACTIVITY.

The identical question presented here is also presented by Case No. 73-2000, *United States v. Peltier,* Petition for Certiorari granted November 11, 1974 and set for argument in tandem with three similar cases, Nos. 73-2050, *U. S. v. Ortiz;* No. 73-6848, *Bowen v. U. S.;* and No. 74-114, *U. S. v. Brignoni-Ponce,* petitions for certiorari granted October 15, 1974.

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3. Ironically, Petitioner also relied upon the dissenting opinion in the Court of Appeals in *U. S. v. Almeida-Sanchez,* 452 F.2d 459 (CA 9, 1971) with which opinion the Supreme Court eventually agreed.

4. Petitioner does not reach the question of whether *Almeida-Sanchez* could be made the basis of a collateral attack on a final conviction. Here Petitioner had given notice of appeal before the decision in *Almeida-Sanchez* was announced.

The Ninth and Tenth Circuits have held *Almeida-Sanchez* to be retroactive, that is, to apply to similar cases pending or on appeal on the date of its decision, June 21, 1973: *U. S. v. Peltier,* 500 F.2d 985 (C.A. 9, May 9, 1974, cert. granted Nov. 11, 1974, #73-2000); *U. S. v. King,* 485 F.2d 353 (C.A. 10, 1973); *U. S. v. Maddox,* 485 F.2d 361 (C.A. 10, 1973). The Fifth Circuit gives *Almeida-Sanchez* prospective application only: *U. S. v. Owen* (the instant case); *U. S. v. Miller* 492 F.2d 37 (C.A. 5, Panel April 8, 1974).

The majority opinion in *U. S. v. Peltier,* supra, fully explores the retroactivity issue. Rather than repeating the argument, Petitioner adopts Circuit Judge Goodwin's logic:

> "Peltier is not claiming the benefit of any decision overruling or enlarging "then applicable constitutional norms", *Williams v. United States,* 401 U.S. at 654; rather, he seeks the application of principles enunciated by Chief Justice Taft in 1925 in *Carroll* and consistently adhered to by the Supreme Court thereafter. This is a case not so much of the retroactivity of *Almeida-Sanchez* as of the continued vitality of *Carroll* and its successors. The Supreme Court in *Almeida-Sanchez* was not announcing a new legal doctrine, but correcting an aberration. *Peltier* is entitled to the benefit of the rule announced in *Almeida-Sanchez,* not because of retroactivity but because of Fourth Amendment principles never deviated from by the Supreme Court." ibid. at p. 989.

Likewise, Petitioner is entitled to the protection afforded him by the Fourth Amendment. He has consistently and persistently pointed out the constitutional deficiency of his arrest and search, before and after *Almeida-Sanchez* was announced. He should not be excluded from

the *Almeida-Sanchez* rule merely because his appeal had not reached the Supreme Court when *Almeida-Sanchez* was decided. The facts of his case are indistinguishable from Almeida-Sanchez and his legal position is identical.

The Supreme Court should grant this Petition for Writ of Certiorari and set this case for hearing in conjunction with *Peltier, Ortiz, Brignoni-Ponce* and *Bowen,* to resolve the conflict between the Circuits and the retroactivity issue.

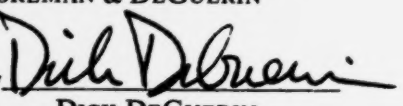
CONCLUSION

For the reasons stated, the Supreme Court should grant Certiorari and upon full hearing:

1. Reverse Petitioner's conviction and order the indictment dismissed; and
2. Resolve the conflict between the Courts of Appeals in favor of the retroactive application of the *ratio decidendi* of *Almeida-Sanchez.*

Respectfully submitted,

FOREMAN & DEGUERIN

By 

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(713) 224-9321

CERTIFICATE OF SERVICE

I, Dick DeGuerin, hereby certify that two typewritten copies of the above and foregoing Petition for Writ of Certiorari have been furnished to the Honorable James Gough, Assistant United States Attorney for the Southern District of Texas, Houston Division at his offices at the Federal Building, 515 Rusk Avenue, Houston, Texas on the 21st day of November, 1974, by certified mail, return receipt requested, and that three copies of the printed Petition for Writ of Certiorari were furnished in like manner on the 23d day of November, 1974.

DICK DEGUERIN

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN FARLEY OWEN,
Defendant-Appellant.

No. 73-2554

Summary Calendar*
United States Court of Appeals,
Fifth Circuit.

April 29, 1974.

Defendant was convicted in the United States District Court for the Southern District of Texas, Ben C. Connally, Chief Judge, of marijuana offenses, and he appealed. The Court of Appeals held that decision of United States Supreme Court in Almeida-Sanchez v. United States did not apply to automobile search for aliens which antedated it.

Affirmed.

Dick DeGuerin, Houston, Tex., for defendant-appellant.

Anthony J. P. Farris, U. S. Atty., James R. Gough, Asst. U. S. Atty., Houston, Tex., for plaintiff-appellee.

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

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* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 431 F.2d 409, Part I, 5th Cir. 1970.

PER CURIAM:

John Farley Owen appeals his conviction for conspiracy to import, importation, and possession with intent to distribute 232 pounds of marijuana. Stopping defendant Owen's car for a "routime immigration inspection" in search of aliens who were in the country illegally, Border Patrol Agents subsequently discovered the marijuana in plain view in the trunk of his car. In light of the validity of the search under this Court's prior decisions, *see* United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973), the sole issue presented by Owen on appeal concerns the constitutionality of the search and seizure of contraband in light of Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). In Miller v. United States, 492 F.2d 37 (5th Cir. 1974) [April 8, 1974, No. 73-1083], however, this Court has held that the *Almeida-Sanchez* principle is to be applied prospectively only. Since the search sub judice occurred prior to the date of the *Almeida-Sanchez* decision, we affirm defendant's convictions.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 73-2554
Summary Calendar

D.C. Docket No. CR 73-L-111

UNITED STATES OF AMERICA
Plaintiff-Appellee

versus

JOHN FARLEY OWEN
Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 29, 1974

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

November 1, 1974

TO ALL COUNSEL OF RECORD

Re: 73-2554 U.S.A. V. OWEN

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By PRINE G. PARENT
Deputy Clerk

cc: Mr. Dick DeGuerin
Mr. James R. Gough

APPENDIX D

U. S. COURT OF APPEALS

FILED NOVEMBER 7, 1974

EDWARD W. WADSWORTH
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-2554

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN FARLEY OWEN,
Defendant-Appellant

ON CONSIDERATION OF THE APPLICATION OF the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including December 1, 1974, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ,

or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Paul H. Roney
United States Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-648

JOHN FARLEY OWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The issue is whether evidence seized in a pre-*Almeida-Sanchez* roving patrol search of petitioner's automobile should have been suppressed.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of illegally importing marihuana into the United States (21 U.S.C. 952(a)), possessing marihuana with intent to distribute it (21 U.S.C. 841(a)(1)), and conspiring to commit the importation offense (18 U.S.C. 371). On the conspiracy and possession counts, petitioner was given concurrent sentences of 40 months' imprisonment, with a special parole term of two years, and was fined $1,000; on the importation count, he was given a five-year suspended sentence and five years' probation, with a special parole term of two years. The court of appeals affirmed (Pet. App. 11-12).

The evidence showed that petitioner's automobile was routinely stopped and inspected for aliens on December 11, 1972, pursuant a "roving patrol" conducted by Border Patrol officers about 50 miles north of the Mexican Border at Hebbronville, Texas. In the course of the inspection, 232 pounds of marihuana were discovered in the vehicle. The court of appeals, in keeping with its decision in *Miller* v. *United States*, 492 F.2d 37, pending on petition for a writ of certiorari, No. 73-6975, held that the principles of this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, should not be applied retroactively to the roving patrol search in this case.

The retroactivity of *Almeida-Sanchez* is before this Court in *United States* v. *Peltier*, No. 73-2000, certiorari granted, November 11, 1974. We suggest, therefore, that the Court defer disposition of the present petition pending the decision in *Peltier* and then dispose of it in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.